[redacted]

(31,844)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 339

J. SMYLIE HERKNESS, APPELLANT,

vs.

VALENTINE K. IRION, COMMISSIONER OF CONSERVATION OF THE STATE OF LOUISIANA, AND PERCY SAINT, ATTORNEY GENERAL OF THE STATE OF LOUISIANA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA

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[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

No. 18272. In Equity

J. Smylie Herkness, Complainant,

v.

Valentine K. Irion et al., Defendants

Bill of Complaint—Filed December 17, 1925

To the Honorable the Judge of the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

J. Smylie Herkness, a citizen of the State of Pennsylvania, and a resident and inhabitant of the County of Montgomery, State of Pennsylvania, brings this, his bill, against Valentine K. Irion, a citizen of the State of Louisiana, and a resident and inhabitant of the Parish of Orleans, in the Eastern District of Louisiana, and against Percy Saint, a citizen of the State of Louisiana, and a resident and inhabitant of the Parish of St. Mary, State of Louisiana, in the Eastern District of Louisiana, and for cause of complaint against said defendants says:

I

Complainant is a citizen of the State of Pennsylvania and is a resident and inhabitant of the County of Montgomery, State of Pennsylvania.

II

Valentine K. Irion is a citizen of the State of Louisiana and is a resident and inhabitant of the Parish of Orleans, State of Louisiana. Said Valentine K. Irion now holds the office of Commissioner of Conservation of the State of Louisiana, which office was created by Act 127 of 1912 of the Legislature of Louisiana, as amended by subsequent

Acts and particularly by Act 105 of 1918, and also by the Constitution of Louisiana of 1921 and especially by Section [fol. 3] 1 of Article 5 and Section 1 of Article 6 thereof.

III

Percy Saint is a citizen of the State of Louisiana, and is a resident and inhabitant of the Parish of St. Mary, State of Louisiana. Said Percy Saint now holds the office of Attorney General of the State of Louisiana, which office was created by the Constitution of Louisiana of 1921, and especially by Section 55 of Article 7 thereof.

IV

Complainant is the owner in fee simple of eighty (80) acres of land situated in the Parish of Morehouse, State of Louisiana, being more particularly described as the S. ½ of the S. E. ¼ of Section 18, Township 20, North Range 5 East Louisiana Meridian, and of the gas in and under seven hundred and sixty (760) acres of land situated in the Parish of Ouachita and the Parish of Morehouse, in the State of Louisiana, more particularly described as the W. ½ of the S. E. ¼, S. E. ¼ of S. W. ¼, N. ½ of the S. W. ¼ and N. W. ¼ of Section 17, and the N. ½ of N. E. ¼, S. E. ¼ of N. E. ¼, N. ½ of S. E. ¼, S. E. ¼ of S. W. ¼ and N. ½ of S. W. ¼ of Section 18 and the S. E. ¼ of N. E. ¼ and N. E. ¼ of S. E. ¼ of Section 20, all in Township 20, North Range 5 East, Louisiana Meridian, together with the exclusive rights to mine and drill said lands for the purpose of producing natural gas. All of the lands above described are contiguous and adjacent to the tract owned by complainant in fee simple.

V

Complainant is the owner of two natural gas wells; one being situated and being on the tract of land above described as owned by complainant in fee simple and the other being situated on the seven hundred and sixty acres above described. Both of said wells were drilled under permits issued by the Department of Conservation of the State of Louisiana and drilling thereof has been completed. Said wells are numbered 130 and 131 on the official map of the Department of Conservation of the State of Louisiana.

VI

Complainant purchased the land owned by him in fee simple as aforesaid and the gas wells and gas rights herein- [fol. 4] above described with a view to erecting on the property owned by him in fee simple a plant for the manufacture of carbon black from the natural gas produced from the two wells aforesaid and from such other wells as might be hereafter drilled on said land, and a plant for the manufacture of ink from carbon black so produced; and complainant is about to expend for that purpose a sum considerably in excess of One Hundred Thousand ($100,000) Dollars for the construction of his plant. Complainant purchased said land, gas rights and wells in the month of June, 1925, and paid therefor the sum of Two Hundred and Twelve Thousand ($212,000.00) Dollars in cash. Said property is without any substantial value except for the purpose of producing natural gas and manufacturing it into carbon black.

VII

The Legislature of the State of Louisiana has not prohibited the use of natural gas for the making of carbon black but, on the contrary, by the provisions of Act 91 of the Legislature of Louisiana, for the year 1922, has expressly provided "that natural gas may be used in the manufacture of barbon black, under the conditions as fixed and imposed by the provisions of this Act;" and the Legislature of the State of Louisiana has furthermore prescribed minute rules and regulations governing the use of natural gas for manufacturing into carbon black by the provisions of Acts 91 of 1922, and 252 of 1924, of the Legislature of Louisiana.

VIII

The Commissioner of Conservation of the State of Louisiana has no authority or power except to make rules and regulations necessary to carry out the provisions of said Acts, and not in conflict therewith, and to enforce such rules and regulations and the provisions of said Acts.

IX

It has been the custom and practice of the Department of Conservation to require persons about to engage in the

manufacture of carbon black to make written application to it for a permit on a form furnished by the Department of Conservation and heretofore said Department of Con- [fol. 5] servation has issued said permits as a matter of course.

In pursuance of the custom and practice aforesaid, complainant, on the 29th day of October, 1925, filed with the Department of Conservation an application for a permit to erect a factory for the manufacture of carbon black, a copy of said application being annexed hereto and made a part hereof and marked "Exhibit A." Said application was on the form furnished by the Department of Conservation and contained all of the information sought by the Department.

X

That on November 23, 1925, the defendant, Valentine K. Irion, acting as Commissioner of Conservation, refused to issue a permit to complainant on the sole ground that the Department of Conservation would not permit the erection or operation of any plants for the manufacture of carbon black from natural gas, other than those plants already in operation in the State of Louisiana for that purpose. Complainant annexes hereto and makes a part hereof a copy of the letter of November 23, 1925, from the defendant, Valentine K. Irion, to Harry H. Russell, Attorney for complainant, refusing to grant complainant a permit and stating the reason for his refusal, marked "Exhibit B."

XI

That the action of said Valentine K. Irion was taken in pursuance of an opinion rendered him by the defendant, Percy Saint, in his capacity as Attorney General of the State of Louisiana. Complainant annexes hereto and makes part hereof a copy of the opinion of the Attorney General, of date November 13th, 1925, marked "Exhibit C."

XII

Complainant avers that he is, and has been, willing and ready at all times to observe and comply with the laws enacted by the Legislature of the State of Louisiana relative to the use of natural gas and its manufacture into carbon

black and such rules and regulations as have been, or may be, validly adopted by the Department of Conservation under the authority granted to it and not in conflict with the provisions of said laws; and that his application for a [fol. 6] permit was not refused on the ground of any failure on his part to observe said laws or said rules and regulations, or of any anticipation that he would fail to observe the same, but solely on the ground that no permits whatsoever for the manufacture of natural gas into carbon black would be issued to persons who were not already engaged in that industry in the State of Louisiana.

XIII

Complainant alleges that defendant, Valentine K. Irion, acting under the advice of defendant, Percy Saint, has adopted and publicly announced as a fixed rule of the Department of Conservation that he will refuse to permit any person not now actually engaged in the manufacture of natural gas into carbon black to engage in such business and that he will vigorously prosecute any and all persons who attempt to manufacture natural gas into carbon black without a permit from the Department of Conservation of the State of Louisiana; and that said defendant, Percy Saint, is prepared to and will lend his assistance to said defendant, Valentine K. Irion, in enforcing the rule aforesaid by instituting criminal proceedings against any person engaged in the business of manufacturing natural gas into carbon black without permit to do so from the Department of Conservation of the State of Louisiana.

XIV

That there are a number of persons now engaged, and who have been engaged for many years, with the permission and sanction of the Department of Conservation, in the manufacture of natural gas into carbon black and that the necessary effect of the rule adopted by the defendant, Valentine K. Irion, as Commissioner of Conservation, in pursuance of the opinion of the defendant, Percy Saint, as Attorney General of the State of Louisiana, and applied by said Valentine K. Irion in refusing to grant a permit to complainant and in attempting to deny to complainant

the right to manufacture natural gas into carbon black is to create a monopoly for the manufacture of natural gas into carbon black in favor of those persons now engaged therein and to prohibit and preclude all other persons from hereafter engaging in the manufacture of natural gas into carbon black within the State of Louisiana.

[fol. 7]

XV

Complainant alleges that the defendant, Valentine K. Irion, and the defendant, Percy Saint, have decided and determined not to permit complainant to erect his plant on the property aforesaid or operate same for the manufacture of natural gas into carbon black and that said Irion has so advised complainant; and that said defendants, unless enjoined by this Honorable Court, will attempt to prevent the erection and operation of said plant by complainant and will institute numerous criminal proceedings seeking to impose heavy fines and penalties upon complainant for erecting or operating his plant.

XVI

Complainant alleges that the Legislature of Louisiana has provided in Section 8 of Act 252 of 1924, as follows:

"That any person, partnership, firm, corporation or association of persons, wilfully violating any of the provisions of this Act, or any rule, regulation or order of the Commissioner of Conservation prescribed and promulgated by authority of this Act, which rules, regulations and orders are hereby declared to have the force and effect of statutory law, shall be guilty of a misdemeanor, and on conviction thereof shall be punished for the first offense by a fine of not less than one hundred ($100.00) dollars, and not more than one thousand ($1,000.00) dollars, and for the second offense not less than one hundred ($100.00) dollars, nor more than five thousand ($5,000.00) dollars, and for the third offense not less than one hundred ($100.00) dollars, nor more than ten thousand ($10,000.00) dollars, in the discretion of the Court, and each and every day on which any person, partnership, or association of persons shall violate any of the provisions of this Act, or any such rule, regula-

tion or order of the Commissioner of Conservation, except as provided in Section No. 4 hereof, shall constitute a separate offense hereunder and subject the offender to the penalty herein provided; and three convictions within a period of two years for violating any of the provisions of this Act, or any such rule, regulation or order of the Commissioner of Conservation, where the violations are wilful and where the second violation succeeds a prior conviction, and the third violation succeeds the second conviction, shall subject the offender in the discretion of the court to the forfeiture of the right to do the business in the State that such offender is engaged in, or carrying on, and wherein such convictions were had, at the suit of the Commissioner of Conservation before a court having jurisdiction at the place where such offenses were committed."

Complainant further alleges that by Section 9 of said Act 252 of 1924, it is made the duty of the Attorney General to represent the Commissioner of Conservation in the enforcement of all of the provisions of said Act and of the orders, rules and regulations made, adopted and promulgated by [fol. 8] said Commissioner of Conservation by authority of said Act and that the District Attorneys throughout the State are under the supervision of, and subject to the orders of the Attorney General of Louisiana with reference to the institution of criminal proceedings on behalf of the State or its Departments.

XVII

Complainant alleges that he has a lawful property right in and to the land owned by him in fee simple, hereinabove described, and in and to the two gas wells hereinabove described, and in and to the gas rights hereinabove described, and has also the right of the free use and enjoyment thereof, subject only to such restrictions as might be reasonably and lawfully imposed upon him in common with all other persons, by the Legislature of Louisiana, with regard to the extraction of natural gas and with regard to the use thereof; that the Legislature of the State of Louisiana has not confined, or attempted to confine, the production of natural gas and the manufacture thereof into carbon black, to persons who are now engaged in such production and

such manufacture; that the action of the defendant, Valentine K. Irion, acting in conjunction with and under the advice of the defendant, Percy Saint, in attempting to prohibit complainant, and all persons other than those now engaged in the production of natural gas and in the manufacture thereof into carbon black from producing such gas or manufacturing same into carbon black is illegal and without authority, and contrary to the laws of the State of Louisiana.

XVIII

That if the laws of the State of Louisiana are to be construed as authorizing the defendant, Valentine K. Irion, to prohibit the production of natural gas and its manufacture into carbon black, save in the case of such persons as are now engaged therein, or as delegating to said Irion the right to prohibit such production and manufacture, except by persons to whom he may choose to issue permits, then such laws are in violation of the provisions of Section 1 and 2 of Article 2 of the Constitution of Louisiana of 1921, dividing the powers of Government and prohibiting the exercise of legislative power by the Executive Department, and of Section 1 of Article 6 of said Constitution providing [fol. 9] for the protection by the Legislature of the natural resources of Louisiana, and of the provisions of Section 2 of Article 1 of said Constitution, prohibiting the deprivation of property, except by due process of law, and of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States prohibiting any State from depriving any person of property without due process of law, or denying to any person the equal protection of the law.

XIX

Complainant alleges that the Department of Conservation is now, and has been for several years, permitting other persons to withdraw natural gas from the lands owned or leased by them and adjacent to the above described lands of complainant and to the two gas wells hereinabove described and that the effect thereof will be the withdrawal of the natural gas from the common reservoir under plaintiff's lands and the lands of such persons, so

that in the course of time no natural gas will be left beneath plaintiff's lands and the two gas wells hereinabove described will be of no value; and that every day that complainant is delayed in exercising his right to produce natural gas from said wells and to manufacture same into carbon black will result in the diminution of the common reservoir from which said natural gas is drawn.

XX

Complainant alleges that the Monroe gas field, wherein your complainant's property is situated, is the most important source of supply of carbon black for the manufacture of news inks in the United States and that your complainant desires to construct a plant for the manufacture of carbon black, for the purpose of selling carbon black to the Chas. Enou Johnson Co., a company engaged in the manufacture of news inks and a company which has been engaged in the manufacture of news inks for over 120 years. That the refusal to grant your complainant a permit to manufacture carbon black will in no way conserve the supply of natural gas used for the purpose of making carbon black in the State of Louisiana, because if the said company is unable to buy carbon black from the plant about to be erected by your complainant, it will be compelled to [fol. 10] buy carbon black from the produce of other gas wells in the Monroe field, as it has been purchasing such carbon black ever since carbon black was manufactured in the said field, and the only effect of the refusal to permit the complainant to proceed with the manufacture of carbon black would be to invest in the combination of carbon black manufacturers now in the field, which said combination was effected within the last year, practically an absolute monopoly in respect to carbon black and an unrestricted power to advance the price thereof, at the pleasure of the combination, and your complainant avers that since the formation of the combination of carbon black manufacturers, hereinabove referred to, the price of carbon black has been increased sixty per cent. or from 5 to 8 cents a pound. Your complainant avers, on information and belief, that there is an agreement between the combination of carbon black manufacturers and the defendant, Valentine K. Irion,

or someone connected with or formerly connected with the office of the said Valentine K. Irion, that the total amount of gas used in the production of carbon black shall not exceed an amount fixed in the said agreement, and that the distribution of the said amount is left to the carbon black manufacturers. The details of this said agreement are not definitely known to your complainant but he has been informed and therefore avers that the effect of this agreement is that the defendant, Valentine K. Irion, will refuse to permit anyone not a party to the agreement to use any gas for the production of carbon black without the consent of the parties to the agreement, and the defendant, the said Valentine K. Irion, has stated that under no circumstances will he permit the erection of any new plants for the production of carbon black. The complainant therefore avers that the action of the defendant, the said Valentine K. Irion, and the execution of the hereinbefore mentioned agreement, is illegal and has resulted in the creation of an illegal and unlawful monopoly.

XXI

Complainant alleges that the plant to be erected by him on the property aforesaid would be absolutely worthless for any other purpose than the manufacture of natural gas into carbon black and that if it is determined after the erec- [fol. 11] tion of said plant that it cannot be used by complainant for such purpose, then the amount expended therefor, which will be in excess of One Hundred Thousand ($100,000) Dollars will be totally lost to complainant.

XXII

That complainant has begun to erect his plant on the property aforesaid and intends to proceed rapidly therewith.

XXIII

That the loss, damage and inconvenience to complainant through the threatened and imminent action of said defendants, Valentine K. Irion and Percy Saint, in interfering with and attempting to prevent the erection by complainant of his plant and the use thereof by him for the

purpose of manufacturing natural gas into carbon black and in instituting proceedings, criminal and otherwise, to inflict fines and penalties upon complainant for such use of his property would cause complainant irreparable damage and injury; and the threatened action of said Saint and of said Irion is without right or color of law and is designed to interfere with and destroy the property rights of petitioner; that complainant has no adequate remedy at law and a writ of injunction is necessary to protect complainant in the premises.

XXIV

Complainant shows that this cause is a suit in equity of a civil nature and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of Five Thousand Dollars ($5,000), and that this cause is one arising under the Constitution and laws of the United States; to wit; Section One of Article 14 of the Amendment to the Constitution to the United States and that in this cause and suit there is a controversy between citizens of different States.

Wherefore, the premises considered, complainant prays for relief, as follows:

(1) That, after due proceedings had, the said Valentine K. Irion and the said Percy Saint, be perpetually enjoined and restrained from interfering or attempting to interfere with the erection by complainant of a factory on the land [fol. 12] described in this bill for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by complainant from the two gas wells described in this bill, or with the manufacture thereof into carbon black.

(2) That, after due proceedings had, said Valentine K. Irion and Percy Saint be perpetually enjoined and restrained from inflicting or imposing, or attempting to inflict, impose or collect any fine or penalty against complainant for the erection by him of a factory on the land described in this bill for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in this bill and its

manufacture into carbon black; and particularly that said Valentine K. Irion and Percy Saint be perpetually enjoined and restrained from ordering, requesting or instituting any suit, either criminal or civil in its nature, against complainant to interfere with the construction, operation or use of his factory on the land aforesaid in the manufacture of carbon black from the gas from the wells aforesaid or to punish complainant by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

(3) That, pending the final hearing of this cause, and after notice and hearing at such time and place as this Honorable Court may designate, an injunction pendente lite may issue against the defendants, enjoining and restraining them as aforesaid.

(4) That a temporary restraining order issue forthwith against the defendants enjoining and restraining them as aforesaid pending the hearing and determination of complainant's application for a preliminary writ of injunction.

(5) That subpœnas in the manner and form, and in accordance with the rules and practice of this Court, be served upon said Valentine K. Irion and said Percy Saint, commanding them, and each of them, in accordance with the rules and practice of this Honorable Court, to appear [fol. 13] herein and true and perfect answer make to this petition, but not under oath (answer under oath being hereby expressly waived) and to stand and abide by the order and decree of this Court in the premises; that the Court may designate a time and place for the hearing of the above prayed for injunction pendente lite, and that due notice thereof be given to all the defendants and to Henry L. Pugua, Governor, and to Percy Saint, Attorney General of the State of Louisiana, in accordance with law and the practice of this Court; that complainant may have such other and further or different relief as equity and the nature of the case require, and all costs in the premises unjustly sustained.

(Sgd.) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant.

Duly sworn to by J. Smylie Herkness. Jurat omitted in printing.

[fol. 14] EXHIBIT "A" TO BILL OF COMPLAINT

Copy

Department of Conservation, Division of Minerals

Application for Permit to Erect Carbon Plant, Monroe, La.

1. Three copies of this application must be accompanied by blue prints or plans showing ground plan of proposed plant.

2. The following data must be furnished:

1. Name of Applicant: J. Smylie Herkness.
2. Address: Rydal, Penna.
3. Name of Louisiana Representative: Harry H. Russel.
4. Address: Monroe, Louisiana.
5. Number of men to be employed: 6.
6. Location of Plant (give part of section, township, & range): S. ½ of S. E. ¼, Sec. 18 N., R. 5 E.
7. Number of Wells: 2.
8. Number of Burning Houses: 32.
9. Number of burners per houses: 2,380.
10. Total Number of Burners: 75,160.
11. Cubic feet of gas to be used: 5,000,000 daily.
12. Approximate output of carbon, 5,500 pounds daily.
13. From what wells: 130 and 131.
14. By whom owned: J. Smylie Herkness.
15. Open Flow Capacity of same: 14,859,680 cu. ft. and 8,988,520 cu. fut.
16. Wet or dry gas: Wet.

Remarks (here give any features of construction which are not generally used): Carbon plant of one unit with gasoline extraction plant.

J. Smylie Herkness.

Witness: James S. Hagan.

[fol. 15] EXHIBIT "B" TO BILL OF COMPLAINT

Copy

State of Louisiana

November 23, 1925.

Mr. Harry H. Russell, Monroe, La.

DEAR MR. RUSSELL: I have your favor of the 12th instant relative to the application filed by you on behalf of J. Smylie Herkness to build and operate a carbon black plant in Sec. 18, T. 20, No. R. 5 East, Morehouse Parish, Louisiana.

In accordance with our conversation on the subject some time ago, I submitted the matter to the Attorney General for an opinion as to my powers and authority in the premises. I am enclosing you a copy of his reply, upon the strength of which your application is hereby respectfully denied.

It has been the policy of this department to curtail rather than increase the consumption of natural gas for the purposes mentioned. It would, therefore, be folly for me to sanction the erection of additional plants under such circumstance.

Very truly yours, (Sgd.) V. K. Irion, Commissioner.

[fol. 16] EXHIBIT "C" TO BILL OF COMPLAINT

Copy

State of Louisiana

November 13, 1925.

Dr. V. K. Irion, Commissioner, Department of Conservation, New Orelans, La.

DEAR DR. IRION: Your letter of the 5th inst. enclosing correspondence and blue print referring to the application of J. Smylie Herkness of Rydel, Penn. for the permit to erect a carbon plant in the Monroe gas field is to hand. I not. that you ask whether or not Mr. Herkness is en-

titled to a permit under the facts and conditions set out in a letter from his attorney and a statement contained in your letter from Mr. Orin M. Grisham.

As I understand the facts, Mr. Herkness bought certain gas property from the Magnolia Carbon Company; that two permits had been granted to the Magnolia Carbon Company prior to the sale to Herkness but the year having expired in each Mr. Herkness now applies for a permit for his company.

Under the provision of Act 250 of 1920, the Conservation Department has full power of administration and regulation of the natural gas resources, and has the power to issue or to refuse to issue permits to burn gas for carbon black plants. All permits are given in an express limit of one year unless sooner revoked for and accepted with full recognition of the powers of the Department of Conservation, which powers authorize your department to refuse to grant a permit or to refuse to renew any permit already granted it is also granted with the understanding and knowledge that the permit is not transferrable.

It is the opinion of this Department that the Department of Conservation is vested with full power and authority to refuse the permit sought by Mr. Herkness. Burning gas to make carbon black is a recognized waste of gas and the only reason that the Department of Conservation granted any permit to use gas in the manufacture of carbon black was that the time the carbon black [fol. 17] was permitted in Louisiana there seemed to have been a limited market for gas to be used in other ways. If your department does not have the power and authority to refuse permits to burn gas in the manufacture of carbon black, it would mean that your department has little authority to conserve natural gas resources of the State; it would also mean that you have very little authority to regulate the output of natural gas. Under those conditions, I am of the opinion that you have full power to decline any further permits to burn gas in the manufacture of carbon black.

Very truly yours, (Sgd.) Percy Saint, Attorney General.

PS:s.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE AND ALLOWING APPLICATION FOR RESTRAINING ORDER—December 17, 1925

Whereas in the above named cause, it has been made to appear in the bill of complaint filed herein that a writ of injunction preliminary to the final hearing is proper, and that prima facie the complainant is entitled thereto, injoining the defendants from the acts complained of and about to be committed.

And it appearing to the Court that this is a case arising under Section 266 of the Judicial Code and that the application for a preliminary injunction should be heard before three judges;

It is ordered that the defendants appear before the Judge of this District Court of the United States for the Eastern District of Louisiana, and a Judge of the Circuit Court of the United States for the Fifth Circuit, and another District or Circuit Judge of the United States Court, sitting to hear this matter on the 29th day of December, 1925, at 11 o'clock A. M., at the Courtroom of the United States District Court at New Orleans, Louisiana, and then and there show cause, if any they have, why the preliminary injunction therein prayed for should not issue; and

Whereas it appears to the undersigned District Judge that there is danger of irreparable injury being caused to the complainant before the hearing of said application for this preliminary writ of injunction can be had, unless defendants are, pending such hearing, restrained as hereinafter set forth;

Therefore complainant's application for such restraining order is granted, upon his giving bond with good and sufficient surety to be approved by the Court in the penal sum of ten thousand dollars, securing the said defendants [fol. 19] against any loss or damage which may result from the issue of such order if it should be finally determined that the same was improperly issued or that it may award to them by reason of the granting of said order;

Now, therefore, it is ordered that Valentine K. Irion, Commissioner of Conservation of the State of Louisiana,

and Percy Saint, Attorney General of the State of Louisiana, be, and they are hereby specially restrained and enjoined until further order of this Court, as follows:

(1) From interfering, or attempting to interfere, with the erection by complainant, J. Smylie Herkness, of a factory on the land described in the bill of complaint for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by complainants from the two gas wells described in the bill of complaint, or with the manufacture thereof into carbon black.

(2) From inflicting or imposing, or attempting to inflict or impose or collect any fine or penalty against complainant, J. Smylie Herkness, for the erection by him of a factory on the land described in the bill of complaint for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint and its manufacture into carbon black, and from ordering, requesting, or instituting any suit, either civil or criminal in its nature, against complainant, to interfere with the construction, operation or use of his factory on the land aforesaid in the manufacture of carbon black from the gas from the wells aforesaid, or to punish complainant by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

It is further ordered that a copy of this order, certified under the hand of the Clerk and the seal of the Court, be served on each of the defendants to be restrained thereby, and that the hearing of this cause on an application for an interlocutory injunction be had and proceeded with in ac- [fol. 20] cordance with Section 266 of the Judicial Code of the United States and that the Governor of Louisiana, and the Attorney General thereof be notified of said hearing in accordance with law.

(Signed) Louis H. Burns, Judge.

[fol. 21] Bond on restraining order for $10,000, approved December 17, 1925, omitted in printing.

[fol. 22] In United States District Court

[Title omitted]

Answer—Filed January 21, 1926

To the Honorable the District Court of the United States for the Eastern District of Louisiana, New Orleans Division:

Now into Court, through undersigned counsel, comes Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana, and make this their joint and several return to the order of Hon. Louis H. Burns, Judge of the U. S. District Court of the Eastern District of Louisiana that your Respondents appear before this special tribunal and show cause why the preliminary injunction herein prayed for should not issue:

1. That this Court has no jurisdiction rationæ personæ or rationæ materiæ.

2. That these proceedings purport to be brought under Article 266 of the Federal Judicial Code and that said Section of said Code does not authorize these proceedings.

3. That this is a suit against the State of Louisiana contrary to the Eleventh Amendment to the Federal Constitution.

4. That the bill herein is insufficient in fact to constitute a valid cause of action in equity, and that relator has an adequate remedy at law.

Reserving the benefit of said exceptions and not waiving same, your Respondents answer and say that the restraining order herein already issued should be recalled because:

5. Your first named Respondent, under advice of your second named Respondent, refused relator the permit to manufacture carbon black that relator alleges was refused him and your Respondents did inform relator that they would use all legal means at their command to prevent the [fol. 23] manufacture of carbon black without a permit.

6. Under article 6, section 4 of the constitution of the State of Louisiana the Governor thereof has appointed your first named Respondent Commissioner of Conservation of said State to direct and control the Department of Conservation,—a department created to protect, conserve and replenish the natural resources of the State of Louisiana.

6½. That your second named Respondent has been elected by the people of the State of Louisiana Attorney General of said State and as such Respondent has charge of all legal matters in which the State of Louisiana has an interest.

7. That whatever acts Relator charges your Respondents have done or are about to do, have been done or will be done in their said capacities representing the State of Louisiana.

8. That more than twenty years ago large and valuable deposits of natural gas and oil were discovered to lie beneath the lands of this State, in the parishes of Ouachita and Morehouse, commonly known as the Monroe Gas Field, where Relator avers the lands owned by him are situated.

9. That said deposits of natural gas and oil are more than 2,000 feet beneath the surface of the earth, are not the private property of the owners of the surface of the lands but are the property of the State of Louisiana and of the people thereof and have been so declared by the Supreme Courts of the United States and of the State of Louisiana.

Ohio Oil Company v. Indiana, 177 U. S., 190;
Frost-Johnson Co. v. Salling, 150 La., 756.

10. That the extraction of natural gas from the common property of the State or from the reservoirs that lie beneath the lands of these Parishes, for the purpose of reduction to private ownership and conversion into carbon black, is subject to regulation, control or complete prohibition by the State of Louisiana.

Wells v. Midland Carbon Co., 254 U. S., 300.

11. That the extraction of natural gas from the soil and the making of the same into carbon black, which Relator declares he exclusively intended to do and is by Respondents

[fol. 24] prevented from doing, is a waste and the greatest waste of the natural resources of the State of Louisiana.

12. That natural gas is well suited for fuel and lighting for industrial and domestic purposes and that the natural gas of the Monroe Oil Field is being largely used for said purposes now and will be used to a greater extent in the near future; that the city of Monroe, which adjoins the Monroe Gas Field, and other towns and industrial plants in the neighborhood of said Field, are greatly dependent on said Field for their supply of gas for fuel and lighting, in industrial and domestic purposes; that there is now being constructed a pipe line whereby the natural gas of the Monroe Gas Field will be conducted from the Field to Baton Rouge—the Capital—and one of the principal cities of the State of Louisiana and will there be largely used, at a vastly cheaper price, for fuel and lighting for industrial and domestic purposes.

13. That the efficiency of the operation of manufacturing carbon black from natural gas is far below the efficiency of using natural gas for fuel purposes, either industrial or domestic, and that when properly based on heat units the efficiency of the operation of manufacturing carbon black is not over 1.75 [illegible].

14. That the amount of natural gas which is thus now wasted in the Monroe Field by carbon black makers in one day would supply the entire city of New Orleans for industrial and domestic purposes for [illegible] days.

15. That Federal and State experts all agree that carbon black should not be made from high pressure gas except where it could not be used for fuel or other purposes; that carbon black should be made exclusively from casing head gas, that is gas produced incidental to the production of oil and from gas that would otherwise go to waste.

16. That Relator contemplates and so declares that he will manufacture carbon black from high pressure natural gas and not from casing head gas.

17. That in every gas producing state of the Union but this the carbon black manufacturers have been relegated to the exclusive use of casing head or waste gas.

[fol. 25] 18. That enormous quantities of high pressure gas have been wasted in the Monroe Gas Field by the carbon black industry until the Field has already been depleted one sixth of the entire supply and to a large extent the industrial and domestic use of natural gas has been debarred by the carbon black manufacture.

19. That on November 2, 1925, the U. S. Department of Commerce, Bureau of Mines, issued a Bulletin on carbon black produced from natural gas in 1924, wherein it is said "Louisiana in 1924 not only lead all the states in the production of carbon black, as it has done since 1921, but increased its relative standing by producing 77 per cent of the total output of this country." This, because every gas producing state in the Union has adopted repressive measures to prevent the waste of its natural gas by the carbon black industry.

20. That the state of Louisiana for nearly twenty years has been enacting laws to prevent the waste of natural gas by its manufacture into carbon black or its use for other than industrial or domestic purposes.

21. That by Act 71 of 1906, page 111, it was made unlawful to wastefully burn natural gas.

22. That by Act 144 of 1908, page 200, the Conservation Commission was created, to report, among other things, on "the prevention of waste in the extraction of oil, gas and other minerals and to suggest appropriate legislation."

23. That by Act 172 of 1910, page 255, the legislature continued such Commission.

24. That by Act 180 of 1910, page 313, the conservation of natural gas by regulations to prevent waste was enacted.

25. That by Act 196 of 1910, page 329, a conservation fund was created, to be supported, among other things, by a tax on natural gas.

26. That by Act 283 of 1910, page 484, the wasteful burning of natural gas was prohibited.

27. That by Act 268 of 1918, page 513, it was made a crime to wastefully burn natural gas.

[fol. 26] 28. That in 1918, by Act 270, page 516, an act was passed looking to the conservation of natural gas.

29. That in 1922, by Act No. 91, page 172, an act to regulate and control the use of natural gas and the manufacture of carbon black and to prescribe penalties for the violation of the act, was passed.

30. That in 1924, Act 252, page 594, was adopted, to conserve the natural gas resources of the state and to define the conditions under which natural gas can be burned into carbon black; to limit the amount that can be produced; and giving your first named Respondent as Commissioner of Conservation authority to make rules and regulations for the conservation of natural gas.

31. The above showing a fixed legislative policy of the State to prevent the destruction of the rights of the State and of the people thereof by anyone who wasted same.

32. That since April 14, 1924, no permit has been issued by the Conservation Commission to anyone to extract natural gas from the soil for the purpose of manufacture into carbon black and that all permits that have been applied for have been refused.

33. That, in spite of the policy of the State of Louisiana, as declared by its legislative acts and in spite of the public declarations of your first named Respondent as Commissioner that he would grant no more permits for the waste of gas by manufacture into carbon black, Relator in June, 1925—long after said policy had been established—came into this State and purchased property which he alleges has no substantial value except for the purpose of producing natural gas and its manufacture into carbon black.

34. That your first named Respondent is ordered by the Constitution of the State to protect, conserve and replenish the natural resources of the State; that the issue by him of further permits to manufacture carbon black from natural gas would result in its waste and complete exhaustion; that Respondent is given by law the right to issue further permits in his official discretion; that he has embarked on a policy of not renewing permits already granted and has only permitted those who are already engaged in the manufacture of carbon black to continue same to a limited ex-

[fol. 27] tent because the sudden shutting down of their plants would result in the destruction of the large investments which have been made; that he is reducing the quantity of natural gas that can be made by the owners of wells already operating with the end in view of ultimately stamping out the industry in this State without too heavy a loss to those already engaged in the industry.

35. That the carbon black industry is a migratory one, has been driven from state to state, as the people of the state in which they locate discover that they are uneconomically exhausting the natural resources thereof that should be devoted to the permanent industrial development and domestic comfort of its people.

36. That the Commission has been gradually reducing the output of carbon from high pressure gas in this State; that on March 1, 1925, it curtailed the supply of gas devoted to carbon black in the Monroe Field to 299,000,000 feet per day and on September 1, 1925, to 290,000,000 feet a day and on March 1, 1926, to 275,000,000 feet a day; that at one time the carbon black plants of the Monroe Field were using such gas to the extent of 450 to 500 million feet a day; that the carbon black plants of the Monroe Field are only now operating at 63 per cent capacity and that within a reasonable time, your first named Respondent will have completely suppressed the use of natural gas in carbon black manufacture in this State.

37. That if no discretion in the suppression of waste of natural gas is vested in your first named Respondent, he must grant permits to all applicants who own gas wells and the policy of the State of Louisiana of preserving natural gas for industrial and domestic use of its people will be defeated.

Wherefore respondents pray that the preliminary restraining order herein issued be recalled and that this suit be dismissed, and for general relief.

(Sgd.) Percy Saint, Attorney General. Wm. H. Thompson, Asst. Atty. General. Edw. Rightor, Special Counsel.

[fol. 28] *Duly sworn to by Valentine K. Iron and Percy Saint. Jurats omitted in printing.*

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF J. SMYLIE HERKNESS—Filed January 21, 1926

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Smylie Herkness, being duly sworn according to law, deposes and says that he is the Complainant in the above entitled action and that he is a citizen of the State of Pennsylvania. That he is the owner in fee simple of eighty acres of land situated in the Parish of Morehouse, State of Louisiana, and that he is the owner of the exclusive right to mine and drill, for the purpose of producing natural gas, seven hundred sixty acres of land situated in the Parish of Ouachita and the Parish of Morehouse in the State of Louisiana, and that he purchased said land and said rights at a cost of Two Hundred and twelve Thousand Dollars for the purpose of erecting a plant for the manufacture of carbon black, and that he is about to expend more than One Hundred Thousand Dollars for the construction of such a plant. That the said property is without any substantial value except for the purpose of producing natural gas and manufacturing it into carbon black. That, under permits issued by the Department of Conservation of the State of Louisiana, the drilling of two natural gas wells has been completed on said tracts of land, said wells being numbered 130 and 131 on the official map of the Department of Conservation of the State of Louisiana.

That on October 29, 1925, deponent filed with the Department of Conservation an application for a permit to erect a factory for the manufacture of carbon black and that on November 23, 1925, his application was refused, and that true copies of his application and of the letter of rejection are attached to his Bill of Complaint in the above case marked Exhibits "A" and "B." That he is and has [fol. 30] been at all times ready and willing to observe and comply with any and all laws enacted by the Legislature of the State of Louisiana relative to the use of natural gas and its manufacture into carbon black.

That defendant, Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, has adopted and publicly announced as a fixed rule of the Department of Conservation that he will refuse to permit any person not now actually engaged in the manufacture of natural gas into carbon black to engage in such business and that he will vigorously prosecute and/ and all persons who attempt to do so, without a permit from the Department of Conservation.

That the property which deponent owns is situated within the Monroe gas field which is the most important source of supply of carbon black for the manufacture of news inks in the United States and that deponent desires to construct a plant in which he will manufacture news inks and also carbon black for the purpose of selling said carbon black and news ink to the Charles Enen Johnson Company, a company which has been engaged in the manufacture of news inks for over one hundred and twenty years, and that if the said Charles Enen Johnson Company is unable to buy carbon black from the plant which deponent desires to erect it will be compelled to buy carbon black from the products of other gas wells in the Monroe field from which it has been purchasing carbon black ever since carbon black was manufactured in said field. That within the last year a combination has been entered into of many carbon black manufacturers now in the fields with the result that an absolute monopoly in respect to carbon black and an unrestricted power to advance the price thereof have been established, and that since the formation of said combination the price of carbon black has already materially advanced.

All of the above facts are true.

(Signed) J. Smylie Herkness.

Sworn to and subscribed before me this 28 day of December, A. D. 1925. (Sgd.) M. A. Hirschfeld, Notary Public. My commission expires Mar. 2, 1929. (Seal.)

[fol. 31] Exhibit to Affidavit of J. Smylie Herkness

Act of Sale from United Carbon Company to J. Smylie Herkness—Filed January 21, 1926

State of Louisiana,
Parish of Ouachita:

Be it known that on this, the 18th day of June, A. D. nineteen hundred and twenty-five, before me, Carl H. McHenry, notary public in and for said parish and State, personally came and appeared United Carbon Company, a corporation duly organized and chartered under the laws of the State of Delaware and legally authorized to do business in the State of Louisiana, herein represented by Oscar Nelson, its Vice-President, duly authorized to act herein by a resolution of the Board of Directors of said Corporation, a certified copy of which resolution is hereto annexed, who declared and acknowledged that for the price hereinafter expressed it has sold, conveyed and delivered, and by these presents does sell, bargain, transfer, assign, set over and deliver unto J. Smylie Herkness, a resident of the city of Philadelphia, State of Pennsylvania, present and accepting this sale for himself, his heirs and assigns, the following property, together with the improvements and appurtenances thereunto belonging, situated in the parish of Ouachita, and parish of Morehouse, State of Louisiana, to-wit:

(a) S. ½ of the S. E. ¼, Sec. 18, Tp. 20 N. R. 5 E., Louisiana Meridian, except the right of way of the A. & L. M. Railroad Company, and the right of way of the Southern Carbon Company now existing over said property and except a two-twelfths (2-12) royalty interest in favor of George T. Young, and a one twelfth (1-12) royalty interest in favor of Thomas H. Boyles of all the oil that may be taken from said land, this royalty to be delivered to the said parties by delivering to their credit free of cost in the [fol. 32] pipe line to which the said grantee may connect its wells, but without the payment of any royalty, whatsoever on gas.

(b) All of the gas in and under the following described land and the exclusive right to mine, drill and take all of

the gas from the said described land, to-wit: W. ½ of the S. E. ¼; S. E. ¼ of S. W. ¼, N. ½ of the S. W. ¼ and the N. W. ¼, Sec. 17; the N. ½ of the N. E. ¼ S. E. ¼ of the N. E. ¼ N. ½ of S. E. ¼, the S. E. ¼ of S. W. ¼ and N. ½ of S. W. ¼, Sec. 18 and the S. E. ¼ of N. E. ¼, N. E. ¼ of S. E. ¼, Sec. 20, all in Twp. 20 N. R. 5 E. Louisiana Meridian, with full rights of ingress and egress for the said purchaser, his employees, vehicles and teams to go in and upon the said described land, for the purpose of drilling the said described land, for the purpose of drilling, mining and taking therefrom the said gas for a period of 50 years from June 30th, 1923, or as much longer thereafter as gas may be produced in paying quantities from said lands; this conveyance of all gas to be without payment of any royalty, whatsoever,

(c) The said grantee to have the right to build carbon plants, gasoline extraction plants, outhouses, and all necessary residences for the purpose of housing its employees who may be hired to operate such plants, and to lay such pipe lines as may be required in the operation of its business or any part thereof.

It is the intention of this Vendor to sell, convey and deliver to this Vendee, all of the property, right, title and interest acquired by Magnolia Carbon Company from Victor C. Barringer by virtue of act of sale and conveyance passed on August 23rd, 1923, before M. C. Thompson, a Notary Public, in and for the Parish of Ouachita, State of Louisiana, and recorded in conveyance book 122, page 150 et seq. of the records of Ouachita Parish, Louisiana, together with all buildings, improvements and appurtenances placed upon or additions to the above described property since the date of the said conveyance aforesaid, as well as all gas and water wells, drilled or placed upon said property, since the date of the conveyance aforesaid, and all machinery, equipment, appliances and appurtenances belonging to or connected with said wells; with full and general warranty; [fol. 33] to have and to hold the said above described property unto the said purchaser, his heirs and assigns forever.

The parties to this act agree to dispense with the production of the Certificate of Mortgage required by Article 3364 of the Civil Code of this State, and tax receipts showing all

taxes to have been paid, and exonerate me from any liability in the premises.

The price for which the above sale is made is the sum of Two Hundred and Twelve Thousand Dollars ($212,000) cash in hand paid, receipt of which is hereby acknowledged and full acquittance therefore given,

Thus done and passed, in the presence of E. T. Lamkin and H. D. Montgomery, witnesses of lawful age, domiciliated in this Parish, who hereunto sign their names, together with the said parties, and me, the said Notary, on this 18th day of June in the year of our Lord, One Thousand Nine Hundred and Twenty-five.

United Carbon Company, by Oscar Nelson, Vice-President. (Seal.)

Attest: E. T. Lamkin, H. D. Montgomery. Carl H. McHenry, Notary Public. (Seal.)

Stamps $222.00.

[fol. 34] Resolution Adopted by the Board of Directors of United Carbon Company at a Special Meeting Held on June 3rd, 1925

"Upon motion duly made and seconded, the following preamble and resolutions were unanimously adopted:

Whereas, J. Smylie Herkness, in accordance with the term of the contract between him and this Company, hereinbefore in these minutes fully set out, will be entitled to a deed covering the property originally conveyed to this Company by Magnolia Carbon Company when such property is released from the lien of this Company's First Mortgage to Guaranaty Trust Company of New York, as Trustee, dated April 1, 1925; and

Whereas, all the resolutions necessary to authorize and secure such release have heretofore been passed by this Board, and all other requisites to the procuring of such release have been complied with by this Company; and

Whereas, a deed has been prepared to be executed by this Company to J. Smylie Herkness conveying to him the property to which he is entitled under the aforesaid contract, which deed is in the following form, to wit:

(Copy of the deed to which these resolutions are attached appears in full in original minutes.)

Now, therefore be it resolved, that the President or a Vice-President of this Company be, and they hereby are, authorized empowered and directed to immediately, upon the execution of the release of the property described in the forgoing deed by the Guaranty Trust Company of New York, as Trustee, from the said Mortgage dated April 1, 1925, execute, acknowledge and deliver the deed of this Company to J. Smylie Herkness in the form above set forth and that the Secretary of this Company be, and he hereby is, authorized, empowered and directed to affix and attest the seal of this Company thereto; and

Be it further resolved, That the officers above mentioned do all things necessary to satisfy the said J. Smylie Herk- [fol. 35] ness that the property covered by the foregoing deed has been properly released from the said Mortgage; and

Be it further resolved, That the said officers of this Company accept the consideration to be paid by the said Herkness and dispose of the same in accordance with the contract between this company and the Magnolia Carbon Company hereinbefore in these minutes fully set forth."

I, G. A. Williams, hereby certify that I am the Secretary of United Carbon Company, a Delaware Corporation, and that the foregoing is a true and correct copy of resolutions duly adopted by the Board of Directors of said Company at a Special Meeting of said Board, duly called and held at Room "E" McAlpin Hotel of New York City, on the 3rd day of June, 1925, at which a quorum was present and voted in favor of said resolutions.

In witness whereof, I have hereunto affixed the seal of said corporation this 5th day of June, 1925.

G. A. Williams, Secretary. (Seal.)

A true record this July 9, 1925. Mattie R. Faust, Deputy Clerk & ex Officio Recorder.

[fol. 36] State of Louisiana,
Parish of Ouachita:

I hereby certify that the within and foregoing is a true and correct copy of the record, together with all endorsements thereon, and resolution thereto, attached as same appears on file and of record in Conveyance Book No. 138 page 591 of the records of Ouachita, Ph. La.

This 20th day of January, A. D. 1926.

(Signed) Mattie R. Faust, Deputy Clerk and ex officio, Notary Public. (Seal.)

[fol. 37] Minute entry of argument and submission January 21, 1926, omitted in printing.

[fol. 38] In United States District Court

[Title omitted]

Stipulation as Hearing—Filed January 22, 1926

It is hereby agreed between Percy Saint, W. H. Thompson and Edward Rightor, Solicitors for Defendants, and Saul, Ewing, Remick and Saul, Harry H. Russell and Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant, that the hearing had in this suit on January 21st, 1926, shall be considered and treated as a final hearing in this suit, and that the Court may enter a final decree therein granting or denying a permanent injunction.

(Signed) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for Complainant. Percy Saint, Attorney General; W. H. Thompson, Asst. Attorney General; E. N. Rightor, Special Counsel, Solicitors for Defendants

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

Before Rufus E. Foster, Circuit Judge, and William I. Grubb and Louis H. Burns, District Judges

OPINION—Filed March 6, 1926

BURNS, D. J.:

Complainant, a citizen of Pennsylvania alleges himself to be the owner of certain land, gas rights and wells in the Parishes of Morehouse and Ouachita, Louisiana, valued at more than $200,000.00, acquired in June, 1925, for the purpose of producing natural gas and manufacturing it into carbon black.

On October 29, 1925, he filed, with the defendant Commissioner of the Department of Conservation, a formal application for a permit to erect a factory for such manufacture of carbon black, which was refused by a letter, stating that, in accordance with a previous conversation with plaintiff's agent, the matter has been submitted for an opinion of the Attorney General of Louisiana, as to the power and authority of the Commissioner of Conservation under the State law. The Commissioner's letter enclosed a copy of the Attorney General's opinion. The letter also recited that the application was denied, and further, that:

"It has been the policy of this department to curtail rather than increase the consumption of natural gas for the purpose mentioned. It would therefore be folly for me to sanction the erection of additional plants under such circumstances."

It appears that, by various acts of the Louisiana Legislature since the discovery and development of the oil and gas fields of Morehouse and Ouachita Parishes, the general regulation of gas production and use has been extended with increasing restrictions, placing the adminis-[fol. 40] trations thereof in the Department of Conservation and under the direction of the Conservation Commissioner, who, since the year 1924, has issued no permits for

the building of carbon black plants. He had then proclaimed publicly that he would issue no new permits and that those permits already issued would not be renewed.

In the face of this declared policy, the complainant alleges that he acquired the property in question in 1925 with a view to erecting a factory and manufacturing carbon black. He further alleges that the property "is without substantial value except for the purpose of producing natural gas and manufacturing it into carbon black."

The complainant contends that the Commissioner of Conservation was not delegated the power, by the Statutes of Louisiana, to enforce a rule prohibiting any person from engaging in the manufacture of carbon black who were not so engaged at the time of the adoption of such rule, particularly since the Statutes authorize the manufacture of carbon black; and therefore any and all persons may so engage at any time, upon compliance with the provisions of law and the lawful regulations of the Conservation Commissioner, as he intends doing; that if the Statutes are construed as delegating such power to the Conservation Commissioner, then such laws are in violation of the Louisiana Constitution, which prohibits the delegation of legislative power to commissioners, boards and executive officers generally, and prohibits deprivation of property without due process of law, and also Section 1 of the Fourteenth Amendment to the Constitution of the United States, likewise prohibiting [fol. 41] a state from depriving a person of property without due process of law, or denying to any person equal protection of the law; that the inevitable effect of the rule adopted by the Conservation Commissioner is to create a monopoly in favor of those now engaged in the manufacture of carbon black, by a wrongful discrimination between that class already so engaged and those who may, in future, desire to so engage, prohibiting the latter class from engaging therein. There is no suggestion that, as between all of the latter class, there is any discrimination.

The substantial complaint is that the respondent Conservation Commissioner, who has refused complainant, and all others, a permit for a new factory, and the Attorney General of Louisiana, will, unless enjoined, institute criminal proceedings against him, or any other person engaging in

such manufacture without a permit, under Act 252 of the General Assembly of Louisiana of the year 1924, which provides that the Commissioner may issue such permits, and any persons operating without same shall be guilty of a misdemeanor punishable by a fine of not less than one hundred dollars or more than ten thousand dollars for each day such manufacture shall continue. There is no suggestion that the complainant has been deprived, as owner, of the complete dominion of his land, nor of the right to mine, drill or otherwise extract gas from the wells thereon, or to dispose of it for fuel or lighting, or for industrial or other purposes as freely as any other owner of such lands and gas wells and of gas reduced to possession.

It is not alleged that the Act of the Louisiana Legislature, No. 252 of 1924, is unconstitutional and therefore void, either under the Constitution of the State or of the [fol. 42] United States, or that an order has been made by the Conservation Commissioner, acting under the statute, as would confiscate or deprive him of a property right before judicial review, and therefore would justify the interference of this Court by issuing an injunction.

The relief prayed for is that the Commissioner and the Attorney General be enjoined: (1) from interfering with the erection of a factory by complainant, and with the subsequent manufacture of carbon black therein; (2) from instituting any suit, civil or criminal, against complainant, by which to penalize him or interfere with such erection of a plant and manufacture.

No proceedings have been filed in the State courts, either by complainant seeking relief to compel the issuance of a permit, or by the Attorney General, charging an offense under the statute.

Under these circumstances it is important to determine whether the case is one substantially within the jurisdiction of this Court, and properly brought within the purview of Section 266 of the Judicial Code.

The owners of land do not own the gas lying below it. Such gas is not susceptible of ownership until reduced to possession. Its extraction and use is subject to regulation, or even complete restriction or suppression by the State. Frost-Johnson Lumber Co. v. Stallings Heirs, 150 La. 756;

Bosleaw v. Cox, 106 Southern 313; Walls v. Midland Carbon Co. 254 U. S. 300-323.

If we should assume that the general unwritten policy or rule of the Conservation Commissioner, denying permits generally, or that his letter denying a permit to plaintiff amounts to an order of an administrative board of the [fol. 43] Commission, acting under and pursuant to a State statute, within the meaning of Section 266 of the Judicial Code, this finding would, of itself, not give the Court jurisdiction, because Section 266 merely prescribes a method of procedure. Wadley S. R. Co. v. Georgia, 235 U. S. 651, 661; 59 L. Ed. 411.

It is equally true that if the unconstitutionality of such an order was well pleaded, this Court would have jurisdiction and owe a duty to try the question whether a preliminary injunction should issue, despite the fact that the unconstitutionality of the statute is not pleaded. Oklahoma Gas Co. v. Russell, 261 U. S. 293.

Of course, the unconstitutionality of either the statute or an administrative order, under the State Constitution, does not concern this Court, which is concerned only with violations of the Federal Constitution. Cook v. Burnquist, 242 Fed. 231.

If the granting of a permit is not discretionary with the Conservation Commissioner, but a ministerial duty he owes under the statute, then plaintiff's right to a judicial review by mandamus proceedings would be plain, adequate and complete. (Sec. 267 J. C.). If it is discretionary, and the Commissioner has mistaken or exceeded his authority, and this results in a prosecution for a misdemeanor, this fact is available as a complete defense. Such judicial review would not be merely nominal and illusory, because the plaintiff is not at the risk of having to pay confiscatory penalties pending a determination of the validity of the order. If it be said that such remedies at law, in the State courts are not adequate because the remedy at law to be considered must be one within the Federal court, where jurisdiction in equity is sought, we are then confronted with the fact that [fol. 44] the Federal courts have no jurisdiction of an original action to issue a mandamus, except as an ancillary remedy in aid of its jurisdiction, otherwise previously

obtained, even though the relief sought concerned a right secured by the Constitution. See Covington and Cincinnati Bridge Co. v. Hager 203 U. S. 109, holding:

"We deem it settled, in controversy, until Congress shall otherwise provide, that Circuit (District) Courts of the United States have no power to issue a writ of mandamus in an original action brought for the purpose of securing relief by the writ, and this result is not changed because the relief sought concerns an alleged right secured by the Constitution of the United States."

Whilst the complainant prays in terms for a mandatory injunction, restraining the Commissioner and the Attorney General from interfering with the erection of a factory, and the subsequent manufacture of carbon black therein, this prayer is, in effect, equivalent to one for the issuance of a writ of mandamus to compel the Conservation Commissioner to submit to the erection of the factory in question and the manufacture of carbon black, thereby accepting the judgment of this Court in lieu of the permit provided for by the statute. See Warner Valley Stock Company v. Smith, 165 U. S. 28-33; Creager et al. v. Bryan, County Judge, et al., 287 Fed. 362.

The remedy by mandamus is essentially and exclusively a legal remedy and is unknown to courts of equity. Assessor of Vernon Parish v. Gould, C. C. A. 5th Circuit, 210 Fed. 894. If, therefore, the remedy is by mandamus, and plaintiff has a remedy at law afforded him by a statute of Louisiana, the case might properly be transferred to the law side of the Court and there be proceeded with under the terms of Equity Rule No. 22, since the jurisdiction here is sought upon a diversity of citizenship and an alleged Federal question, except for the fact that United States Courts [fol. 45] have no jurisdiction in original cases of mandamus (8 Encyc. U. S. Supreme Court Reports, 20.)

The second prayer of the bill is in no better case. The prayer amounts to no more than that this Court, as a Court of Equity, may competently intervene to restrain threatened criminal proceedings for the alleged violations of a statute alleged to be valid and consitutional, upon the ground that such proceedings, by a misapplication of the statute, may work an injury to complainant's proposed

business. This, the Courts of the United States are forbidden to do; Section 265 of the Judicial Code specifically prohibits injunctions to stay proceedings in State Courts: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The exceptional cases in which a Court of Equity is justified in interposing its restraining arm to prevent criminal prosecution are stated in Re Sawyer, 124 U. S. 200, 31 L. Ed. 402; Davis and Farnham v. Los Angeles, 189 U. S. 207, 47 L. Ed. 778; and Dobbins v. Los Angeles, 195 U. S. 223, 49 L. Ed. 169.

From these decisions it appears well settled that in cases only where property rights would be destroyed, criminal proceedings under a void law or an ordinance may be reached and controlled by a Court of Equity. In this case these necessary elements are not present in the bill, and the sole injury or loss to the complainant would be such only as might arise from his arrest and prosecution. His bill clearly shows that he anticipates, only, some action by a State officer under a penal Statute, by reason of a wrongful [fol. 46] construction of same. If the State officers sought to be enjoined are proceeding under a valid statute of the State, they represent the State, and a suit to enjoin them is a suit against the State, within the meaning of the Eleventh Amendment to the Constitution. On the other hand, if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the State are not considered as representing the State, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the State. Central Consumers Co. of New Jersey v. Austin, 228 Fed. 619.

"If the statute is conceded to be valid, a Federal Court of Equity has no more right to interfere with the enforcement of the State's criminal laws by its law officers, through its courts, because of anticipated errors in the construction of the Statute by the Judge, than it would have to interfere because of anticipated errors in the decision of facts by a jury." Ibid. See also Hoffman v. McElligott, 259 Fed. 525.

The contention of complainant that his deprivation of the permit amounts to a deprivation of his property without due process of law and denies him the equal protection of law, does not sufficiently show that the refusal of a permit made any distinction between himself and any other persons who have been so denied since the adoption of the Commissioner's policy or rule. Should we concede that the denial of this permit amounted to a deprivation of property, it would not follow that the rule or policy of the Commissioner was contrary to the 14th Amendment. In Granger et als. v. Douglas Park Jockey Club, C. C. A. 6th, 148 Fed. 513, it was held that the constitutionality of a statute must [fol. 47] be determined by its provisions and not by the manner in which it is in fact administered. A statute or ordinance depriving one of his liberty or property, is not in violation of the 14th Amendment merely because of such deprivation; nor is every classification made under the police power of a state voidable therefor; the test is that to be valid they rest upon some reasonable public policy and some real and substantial relation to the object sought to be accomplished; and every presumption is in favor of the rightful exercise of its power by the legislature or officer acting under its authority.

From these considerations it follows that the complainant's bill must be dismissed.

(Signed) Louis H. Burns, Judge.

New Orleans, March 6th, 1926.

Foster, C. J., ad Grubb, D. J., concur.

[fol. 48] In United States District Court

[Title omitted]

Decree—Filed March 6, 1926

This cause came on to be heard at a former day upon the pleadings, exhibits, affidavits and evidence and was argued and submitted by counsel for the respective parties;

Whereupon, and on due consideration thereof, and for the reasons assigned in the written opinion on file.

It is ordered, adjudged, and decreed that the bill of complaint of the complainant J. Smylie Herkness, be and the same is hereby dismissed, with costs.

(Signed) Rufus E. Foster, (Circuit Judge), W. I. Grubb (District Judge), Louis H. Burns (District Judge).

[fol. 49] In United States District Court

[Title omitted]

Petition for Appeal.—Filed March 20, 1926

To the Honorable Rufus E. Foster, William I. Grubbs, and Louis H. Burns, sitting herein as a special tribunal for the District Court of the United States for the Eastern District of Louisiana under the provisions of Section 266 of the Judicial Code:

Now comes J. Smylie Herkness, petitioner herein, through his undersigned counsel, and shows that heretofore a restraining order was granted to him in this case on his application; that thereafter, his application as Complainant, for an interlocutory injunction was referred by the Honorable Louis H. Burns, District Judge for the Eastern District of Louisiana to a special tribunal composed of the Honorable Rufus E. Foster, United States Circuit Judge for the Fifth Judicial Circuit, the Honorable William I. Grubb, United States district Judge for the Northern District of Alabama, and the Honorable Louis H. Burns, United States District Judge for the Eastern District of Louisiana, under the provisions of Section 266 of the Judicial Code; that after due notice, said application for an interlocutory injunction against the defendants came on to be heard on the 21st day of January, 1926, before said special tribunal; that it was stipulated at the time of said hearing between counsel representing petitioner and counsel representing the defendants, that the hearing had on January 21, 1926, should be considered and treated as a final hearing in this suit, and that the court might enter a final decree therein granting or denying a permanent injunction; that on March 6, 1926, a final decree was entered and signed, denying petitioner's application

[fol. 50] for an injunction and dismissing petitioner's suit at his cost.

Petitioner, J. Smylie Herkness, feeling aggrieved by the said decree refusing the said injunction and dismissing petitioner's suit at his cost, hereby prays that an appeal may be allowed to him from the judgment and decree aforesaid, rendered by the said special tribunal to the Supreme Court of the United States, because said injunction was not granted as prayed for by petitioner, and because the decree refusing to grant said injunction was contrary to the law and the evidence, and petitioner submits herewith his assignments of error and prays for a reversal of said judgment and decree, and prays a writ of injunction be granted in accordance with the prayer of plaintiff's petition, and for such further relief as may be proper.

Petitioner further shows that if a supersedeas be not granted herein, and if an order be not entered herein maintaining the statue quo ante said decree, and enjoining and restraining defendants herein, as prayed for in petitioner's bill, until the supreme Court of the United States shall have passed upon said appeal, irreparable injury will accrue to it, and it will otherwise be without remedy in the premises.

Petitioner shows that the order of the defendant, Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, which is attacked in these proceedings, is an order refusing to issue a permit to petitioner for the erection of a plant for the manufacture of natural gas into carbon black upon certain land purchased by petitioner in the month of June, 1925, together with gas rights and wells on or adjacent thereto, for the sum of Two Hundred and Twelve Thousand ($212,000.00) Dollars in cash; that said lands, gas rights and gas wells derive their value entirely from the fact that said natural gas may be utilized for manufacture into carbon black; that said natural gas is not available for any other use than for its manufacture into carbon black, on account of the physical situation of said property, and that said property, consisting of said lands and said gas rights and wells, is without any substantial value, except for the purpose of producing natural gas and manufacturing it into carbon black; that the construc-
[fol. 51] tion by petitioner on said property of a plant for the manufacture of said natural gas into carbon black

will cost in excess of One hundred Thousand ($100,000.00) Dollars; that unless An order is entered enjoining and restraining the defendants, pending the appeal, in the manner prayed for in petitioner's Bill, petitioner will either be forced to let said lands, gas rights and wells remain idle and to defer the construction of said carbon black plant until the determination of said appeal by the Supreme Court of the United States, during which time the gas underlying said lands and the lands adjacent thereto and constituting the gas reservoir common to said lands and the adjacent lands, and supplying the gas wells of petitioner, will be withdrawn, by other persons who are extracting gas from said common reservoir and manufacturing therefrom carbon black under permits issued to them by the Commissioner of Conservation of the State of Louisiana and with his acquiescence and approval, or petitioner will have to proceed with the erection and operation of said carbon black plant and thereby subject himself to repeated criminal prosecutions, involving the infliction of enormous fines and penalties, and the forfeiture of his right to do business in Louisiana.

Wherefore petitioner prays:

(1) That an appeal may be allowed to him herein from the judgment and decree entered herein on the 6th day of March, 1926, and hereinabove complained of;

(2) That an order of supersedeas may be entered herein, pending the final disposition of the cause;

(3) That an order may be entered maintaining the status quo ante the final decree herein, pending the hearing and determination of this appeal by the Supreme Court of the United States, and enjoining and restraining the defendants herein, Valentine K. Irion and Percy Saint, pending the hearing and determination of said appeal by the Supreme Court of the United States, from interfering or attempting to interfere with the erection by petitioner of a factory on the land described in the bill of complaint [fol. 52] herein for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by petitioner from the two gas wells described in the bill of complaint, or with the manufacture thereof

into carbon black; and from inflicting or imposing, or attempting to inflict, impose or collect any fine or penalty against petitioner for the erection by him of a factory on the land described in the bill of complaint, for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint, and its manufacture into carbon black; and from ordering, requesting or instituting any suit, either criminal or civil in its nature, against petitioner to interfere with the construction, operation or use of his factory on the land aforesaid, in the manufacture of carbon black from the gas from the wells aforesaid, or to punish petitioner by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black;

(4) Petitioner prays that a transcript of the record, proceedings and papers upon which the decree and order of March 6, 1926 was made may be sent to the Supreme Court of the United States, at Washington, D. C.; and for such other and further orders as may be necessary in the premises, and for general relief.

(Signed) J. Smylie Herkness, Petitioner, by Saul, Ewing, Remick & Saul, Harry H. Russel, His Solicitors.

[fol. 53] In United States District Court

[Title omitted]

Assignments of Errors—Filed March 20, 1926

And now comes J. Smylie Herkness, Complainant herein, and says that the judgment and decree rendered in this case by the special tribunal composed of the Honorable Rufus E. Foster, the Honorable Louis H. Burns and the Honorable William I. Grubb, on the 6th day of March, 1926, in this case, is erroneous and against the just rights of said Complainant, for the following reasons: which are assigned as errors and as a part of the appeal upon which he will rely in the prosecution of this appeal, to wit:

(1) The Court erred in holding that it was not alleged in the Bill of Complaint, that the Act of the Legislature, No. 252 of 1924, is unconstitutional and therefore void, either under the Constitution of the State or of the United States;

(2) The Court erred in holding that it was not alleged in the Bill of Complaint that such an order has been made by the Conservation Commission, acting under said Act No. 252 of 1924, as would confiscate or deprive him of his property rights before a judicial review and would justify the interference of said court by issuing an injunction;

(3) The Court erred in holding that the owners of land have no property right in and to the gas contained in the field common to said lands and adjacent lands, and that the extraction and use of said gas by such land owners is subject to complete restriction or suppression by the State;

[fol. 54] (4) The Court erred in holding that it could not consider whether the statutes of Louisiana involved in this case, and the order of the Conservation Commission of Louisiana denying a permit to Complainant, violated any provision of the Constitution of Louisiana, and in holding that said Court was concerned only with violations of the Federal Constitution;

(5) The Court erred in holding that the fact that plaintiff had an adequate remedy at law in the state courts had any bearing upon the question of his right to the relief prayed for, for the reason that the test of the right of a Complainant to equitable relief in the Federal Courts is whether there is an adequate remedy at law in such Courts;

(6) The Court erred in holding that Complainant had an adequate remedy at law in the State Courts;

(7) The Court erred in holding that the relief prayed for was in effect equivalent to an application for the issuance of a writ of mandamus, and that for that reason it could not grant the relief prayed for;

(8) The Court erred in holding that this suit was in any wise, or as to any of the relief prayed for, a suit against the State within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States;

(9) The Court erred in holding that the action of the Commissioner of Conservation in refusing to issue a permit to petitioner, and the statutes of Louisiana and particularly Act 252 of 1924, if construed as authorizing said Commissioner of Conservation to refuse said permit to petitioner, were not invalid and void, as denying the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States;

(10) The Court erred in denying petitioner the injunction prayed for, and in dismissing petitioner's suit;

(11) The Court erred in not holding that the statutes of Louisiana, and particularly Act 252 of 1924, did not authorize the Commissioner of Conservation of Louisiana to refuse permits for the manufacture of natural gas into carbon black, by persons who had not theretofore engaged in such industry;

[fol. 55] (12) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decide and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he might see fit, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Sections 1 and 2 of Article II, and of Section 1 of Article V of the Constitution of Louisiana of 1921, prohibiting the delegation of legislative power to the Executive Department, and providing that the Commissioner of Conservation should have such authority and powers as may be prescribed by the Legislature, and that the Legislature should enact laws to protect and conserve the natural resources of the State, and to prohibit and prevent the waste or any wasteful use thereof;

(13) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decide and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of

natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he might see fit, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Article — of Section 1 of the Constitution of Louisiana of 1921, prohibiting the deprivation of property, except by due process of law;

(14) The Court erred in not holding that if the laws of Louisiana are to be construed as delegating to the Commissioner of Conservation of Louisiana the right to decline and to provide by rule, regulation or otherwise, whether persons not theretofore engaged in the manufacture of natural gas into carbon black should be permitted to engage in said business, and to refuse to grant permits to such persons to engage in such business according as he [fol. 56] might see fit, while at the same time permitting persons theretofore engaged in said business to continue therein, then such laws, and particularly Act 252 of 1924, are in violation of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, prohibiting any State from depriving any person of his property without due process of law, or denying to any person the equal protection of the law.

(15) The Court erred in not rendering a final decree in petitioner's favor, as prayed for, and in not issuing a permanent injunction as prayed for by petitioner.

(Signed) Saul, Ewing, Remick & Saul, Harry H. Russell, Spencer, Gidiere, Phelps & Dunbar, Solicitors for J. Smylie Herkness.

[fol. 57] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed March 20, 1926

This cause came on to be heard on this, the 20 day of March, 1926, upon petition of the Complainant, J. Smylie Herkness, for an appeap to the Supreme Court of the

United States from the final decree of the special tribunal to which it was referred, dated the 6th day of March, 1926, denying the injunction prayed for by Complainant against the defendants and each of them, and dismissing Complainant's bill at his costs; and the court having seen and considered the assignment of error exhibited with the petition for appeal,

It is ordered, that an appeal be and the same is hereby granted to said J. Smylie Herkness, to the Supreme Court of the United States from the Judgment and decree aforesaid.

It is further ordered, that a supersedeas be granted to said J. Smylie Herkness, as prayed for.

It is further ordered, that Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana, be and they are each hereby enjoined and restrained, pending the hearing and determination of said appeal by the Supreme Court of the United States, from interfering or attempting to interfere with the erection by petitioner of a factory on the land described in the bill of complaint herein for the manufacture of natural gas into carbon black, or with the operation of such factory for the manufacture of carbon black, or with the production of natural gas by petitioner from the two gas wells described in the bill of complaint, or with the manufacture thereof into carbon black; and from inflicting or imposing, or attempting to inflict, impost or collect any fine or penalty against petitioner for the erection [fol. 58] by him of a factory on the land described in the bill of complaint, for the manufacture of carbon black, or for the operation thereof, or for the production of natural gas from the gas wells described in the bill of complaint, and its manufacture into carbon black; and from ordering, requesting or instituting any suit, either criminal or civil in its nature, against petitioner to interfere with the construction, operation or use of his factory on the land aforesaid, in the manufacture of carbon black from the gas from the wells aforesaid, or to punish petitioner by the infliction of fines or penalties for erecting said factory or operating same or producing the natural gas from said wells and manufacturing same into carbon black.

It is further ordered, that said J. Smylie Herkness give bond in the sum of two thousand ($2,000.00) dollars, with good and sufficient surety to be approved by the Judge of the United States District Court for the Eastern District of Louisiana, or the Clerk of said Court, conditioned that appellant shall prosecute his appeal to effect and shall answer all damages and costs, if he fails to make his plea good. Said bond to be also conditioned for the repayment to defendants, or either of them, of any loss or damage which they, or either of them, may suffer as a result of the issuance and continuance of the injunction and restraining order issued herein, pending the determination of this appeal by the Supreme Court of the United States.

Dated this twentieth day of March, 1926.

(Signed) Rufus E. Foster, United States Circuit Judge for the Fifth Judicial Circuit. Louis H. Burns, United States District Judge for the Eastern District of Louisiana. William I. Grubb, United States District Judge for the Northern District of Alabama.

[fols. 59 & 60] Bond on appeal for $2,000.00, approved and filed March 20, 1926, omitted in printing.

[fol. 61] In United States District Court

[Title omitted]

Praecipe for Transcript of Record—Filed March 25, 1926

Honorable H. J. Carter, clerk:

You are requested to take a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following and no other papers or exhibits, to wit:

1. Bill of Complaint and exhibits attached thereto and affidavit to said bill of complaint;

2. Order of court rendered upon presentation of Bill of Complaint;

3. Bond given in connection with restraining order;

4. Answer of defendants;

5. Affidavit of J. Smylie Herkness;

6. Certified copy of Act of Sale from United Carbon Company to J. Smylie Herkness;

7. Minute Entry of hearing on January 21st, 1926;

8. Stipulation of counsel that hearing should be treated as a final hearing;

9. Opinion of the Court;

10. Decree;

11. Petition for Appeal;

12. Assignment of Errors;

13. Order granting appeal and special injunction;

14. Appeal Bond.

(Signed) Spencer, Gidiere, Phelps & Dunbar, Attorneys for J. Smylie Herkness, Complainant and Appellant.

[fol. 62] State of Louisiana,
Parish of Orleans:

Before me, the undersigned authority, personally came and appeared, Esmond Phelps, who being duly sworn deposes and says:

That he is a member of the law firm of Spencer, Gidiere, Phelps and Dunbar, Solicitors for J. Smylie Herkness, Appellant in the above cause; that a copy of the above praecipe has been served upon Edward Rightor, Solicitor for Appellees.

(Signed) Esmond Phelps.

Sworn to and subscribed before me this 24th day of March, 1926. (Signed) Sumter D. Marks, Jr., Notary Public. (Seal.)

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] Citation, in usual form, showing service on Percy Saint, filed March 30, 1926, omitted in printing.

[fol. 65] Citation, in usual form, showing service on Valentine K. Irion, filed March 30, 1926, omitted in printing.

[fol. 66] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANT TO PRINT THE ENTIRE RECORD—Filed April 27, 1926

1. The Court below had jurisdiction.

2. The case comes properly under Section 266 of the Judicial Code.

3. The order of the Conservation Commissioner is unwarranted by law.

4. The order of the Conservation Commissioner is contrary to the Statutes and Constitution of Louisiana.

5. The order of the Conservation Commissioner is contrary to the Fourteenth Amendment of the Constitution of the United States.

6. The Statutes of Louisiana and particularly Act 252 of 1924 do not authorize the Conservation Commissioner to refuse permits for the manufacture of natural gas into carbon black by persons not theretofore engaged in such industry.

[fols. 67 & 68] 7. If the laws of Louisiana are construed as delegating to the Conservation Commissioner the right to refuse to grant permits for the manufacture of carbon black to those not theretofore engaged in such industry, then such laws are in violation of the Constitution of Louisiana and the Constitution of the United States.

8. An injunction to restrain the Conservation Commissioner and Attorney General of Louisiana from interfering with the use of complainant's property in the manufacture of natural gas into carbon black is the proper remedy to be pursued.

9. The right to proceed by mandamus in the State Court, if it exists, is not such an adequate remedy at law as to deprive complainant of his right to equitable relief in the Federal Court.

10. This is not a suit against the State of Louisiana within the meaning and intendment of the Eleventh Amendment to the Constitution of the United States.

All of the record is necessary for the consideration of the above points.

Saul, Ewing, Remick & Saul, John W. Davis, Attorneys for Appellant.

[fols. 69-72] AFFIDAVIT OF SERVICE—Filed April 29, 1926

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Allen S. Olmsted, 2nd, being duly sworn according to law deposes and says that he is of counsel for the appellant in the above-entitled case and that he served copies of the within statement of the points on which appellant intends to rely and of the parts of the record which he thinks necessary for the consideration thereof on the appellees by depositing a copy thereof, duly registered, in the mails of the United States, addressed to the said appellees.

Allen S. Olmsted, 2nd.

Sworn to and subscribed before me this 27th day of April, A. D. 1926. L. C. Sturtevant, Notary Public. Commission expires February 26th, 1927. (Seal of Laura C. Sturtevant, Notary Public, Philadelphia.)

[fol. 73] [File endorsement omitted.]

Endorsed on cover: File No. 31,844. E. Louisiana D. C. U. S. Term No. 339. J. Smylie Herkness, appellant, vs. Valentine K. Irion, Commissioner of Conservation of the State of Louisiana, and Percy Saint, Attorney General of the State of Louisiana. Filed April 13th, 1926. File No. 31,844.